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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRINCETON UNIVERSITY AND
STATE OF NEW JERSEY, *Appellants,*

v.

CHRIS SCHMID, *Appellee.*

On Appeal From The Supreme Court Of New Jersey

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AND THE NATIONAL INSTITUTE OF INDEPENDENT COLLEGES AND UNIVERSITIES AMICI CURIAE IN SUPPORT OF APPELLANTS

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BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AND THE NATIONAL INSTITUTE OF INDEPENDENT COLLEGES AND UNIVERSITIES AMICI CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF AMICI

The American Council on Education (ACE) and the National Institute of Independent Colleges and Universities (NIICU) are nonprofit corporations organized under the laws of, and located in, the District of Columbia. Founded in 1918, ACE is a voluntary membership organization composed of 1,401 non-profit institutions of higher education from both the public and private sectors and 178 educational associations

and organizations. NIICU's membership consists of approximately 850 independent, non-profit colleges, universities and educational associations.

ACE is the nation's major coordinating body in postsecondary education. NIICU's mission is to provide a unified national voice for independent higher education in the shaping of public policy. As organizations whose members include the overwhelming majority of four-year colleges and universities, ACE and NIICU are uniquely able to represent the interests of higher education generally on matters of national importance, including the case pending before this Court.

All of the colleges and universities that are members of ACE and NIICU have a substantial interest in the outcome of this case. Nineteen of ACE's and/or NIICU's members are independent, non-profit colleges and universities, located in New Jersey. In addition to Princeton University, included in ACE's and/or NIICU's membership are: Beth Medrash Gohova, Bloomfield College, Caldwell College, Centenary College, College of Saint Elizabeth, Drew University, Fairleigh Dickinson University, Felician College, Georgian Court College, Monmouth College, New Brunswick Theological Seminary, Northeastern Bible College, Rider College, Saint Peter's College, Seton Hall University, Stevens Institute of Technology, Union College, Upsala College and Westminster Choir College. All of these institutions will be affected directly by the Court's answer to the question presented for review:

> Whether a private university has the right under the First, Fifth and Fourteneth Amndments to determine without state interference what expres-

sive activities by strangers it will permit on its campus and under what circumstances.

The decision of the New Jersey Supreme Court subjects each of these colleges to governmental scrutiny and regulation of expressive activities that are protected from infringement by the United States Constitution.

The many other independent colleges and universities not located in New Jersey that are members of ACE and NIICU also have a substantial stake in the outcome of the Court's review of this case. The Court's judgment regarding the proper balance to be struck between the first amendment right of colleges and universities to determine and pursue educational objectives and the police power of the states can have nationwide consequences.

Finally, the public colleges and universities that are members of ACE have a significant interest in the answer to the question presented by appellants. For purposes of interpreting the scope of an individual's first amendment rights, the courts have long recognized valid and important distinctions between the grounds and buildings of government operated colleges and universities, and public streets and parks. A decision that fails to recognize the expressive nature of the education enterprise and to take that into account in balancing constitutionally protected interests could lead to erosion of other Supreme Court doctrines that properly limit governmental intrusion on academic freedom and insure the ability of all colleges and universities to regulate the use of their facilities in a manner consistent with maintaining an environment conducive to teaching and learning.

SUMMARY OF THE ARGUMENT

In *Princeton University and State of New Jersey* v. *Schmid*, the New Jersey Supreme Court interpreted the New Jersey Constitution as conferring on strangers to the campus of a private university an affirmative right to engage in expressive activities on the college's private property. This interpretation of New Jersey law presents a substantial question of federal constitutional law.

The Appellee in this case, Chris Schmid, has no federal first amendment right to distribute literature on the campus of Princeton University—a private chartered institution of higher education in the State of New Jersey. The first amendment does not regulate the actions of private parties but only prohibits governmental abridgement of free speech. The only "right" of access to Princeton's private property which the Appellee has is a right under state law which was conferred on him by the New Jersey Supreme Court's interpretation of the New Jersey State Constitution.

On the other hand, Princeton University, which together with the State of New Jersey seeks review of the decision below, does have federal first amendment rights which are at issue in this case. These rights are infringed by the New Jersey Supreme Court's ruling that Mr. Schmid is entitled to free access to Princeton's private property subject only to such regulations of time, manner and place that the New Jersey Court says are reasonable given its understanding of Princeton's educational objectives.

Four freedoms which are essential to any university are guaranteed to Princeton by the first amendment: "to determine for itself on academic grounds who may

teach, what may be taught, how it shall be taught, and who may be admitted to study." The New Jersey Supreme Court's interpretation of the State Constitution intrudes on Princeton's exercise of these rights by substituting the State Court's analysis of Princeton's educational mission, and its judgment of what uses of Princeton's property are consistent with that mission, for Princeton's own constitutionally protected determinations regarding these issues. This action by the New Jersey Supreme Court is precisely the sort of governmental abridgement of free speech against which the first amendment was designed to protect.

Princeton University's federally protected first amendment rights are paramount to any interest in expressional activities conferred on Mr. Schmid by the State of New Jersey. Because it fails to recognize the existence and supremacy of Princeton's important first amendment freedoms and the national interest which they serve, the decision of the New Jersey Supreme Court contravenes the federal constitution and it must be reversed.

ARGUMENT

I.

The Federal Constitution Does Not Require Private Colleges and Universities To Open Their Campuses To The Expressive Activities Of Strangers.

It has long been settled that the guarantee of free speech in the first amendment to the United States Constitution:

> is a guarantee only against abridgment by the government. *See Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973). Thus, while statutory or common law may in some situations extend protection or pro-

> vide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself. *Hudgens* v. *NLRB*, 424 U.S. 507, 513 (1976)

Therefore, unless there is some reason to conclude that action by a private university such as Princeton is governmental action, a stranger to a private college campus like Mr. Schmid has no federally protected right to distribute literature on the institution's private property, and the institution is not required to permit him to engage in such activities.

The Supreme Court held in *Hudgens* that, in a case such as this one, the appropriate standard for determining whether a private property owner's action can be construed as governmental action subject to constitutional restraints is the test first applied by the Court in *Marsh* v. *Alabama*, 326 U.S. 501 (1946). The *Marsh* standard is a qualitative rather than a quantitative one. Thus, the mere size or physical character of a private college's property holdings is not determinative. Similarly, the fact that some services the college provides are like some services some municipalities provide is not dispositive.

For *Marsh* to apply, the private university must be "performing the full spectrum of municipal powers and stand in the shoes of the State." *Hudgens* v. *NLRB*, 424 U.S. at 519. The mere fact that the private institution is engaged in the "business" of education, a business "affected with a public interest" and regulated by the federal government and the states, is not sufficient to transform its private actions into state actions. *Jackson* v. *Metropoliton Edison Co.*, 419 U.S. 345, 354 (1974). Nor is the fact that the state also is

engaged in the business of education sufficient to make all education a "public function" subject to constitutional restraints.

> The range of governmental activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions. While a State may not segregate public schools so as to exclude one or more religious groups, those sects may maintain their own parochial educational systems. *Evans* v. *Newton,* 382 U.S. 296, 300 (1966).[1]

There is no question in this case that Princeton University does not have all of the attributes nor perform all of the functions of a municipality. *State of New Jersey* v. *Chris Schmid and Stephen Komm,* No. SC53264 (Borough of Princeton Mun. Ct. October 30, 1978), Appellants' Jurisdictional Statement at 65A. Therefore, Princeton's decision to limit strangers' access to its campus is not "state action" limited by the federal constitution. Since the constitution makes no attempt to order the relationship of two private parties, whatever claim Mr. Schmid has to access to Princeton's campus, it is not a federal one.

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[1] *See also, Greenya* v. *George Washington University,* 512 F.2d 556, 561 n.10 (D.C. Cir. 1975):

> [W]e have considered whether higher education constitutes "state action" because it is a "public function" as that term has been developed since *Marsh* v. *Alabama,* 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946), and have concluded that it is not. We agree with the Second Circuit's conclusion that education, even at the primary or secondary levels, has never been a state monopoly in the United States. As a historical matter, the wide-scale private development of higher education in this country preceded state entry into the field by more than a century. [Citations omitted.]

II.

The Federal Constitution Prohibits The States From Compelling Private Colleges and Universities To Dedicate Use of Their Property To The Expressive Activities Of Strangers.

As noted above, in *Hudgens* v. *N.L.R.B.*, 424 U.S. 507 (1976), the Supreme Court laid to rest the notion that the federal constitutional guarantee of free speech has a part to play in ordering the relationship of two private parties:

> It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state. 424 U.S. at 513.

At the same time, the Court held open the possibility that "statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others . . . ." *Id.*

In *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), the Court confronted its first example after *Hudgens* of state law designed or interpreted to provide additional protection to expressive activities. The Court upheld a decision of the California Supreme Court, *Robins* v. *PruneYard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), that the California Constitution protects the reasonable exercise of free speech in private shopping centers. However, in affirming the lower court decision, the Supreme Court made clear that the exercise of the state police power to protect free speech activities on private property is not without limits, and it is the limits identified in *PruneYard* that require reversal of the New Jersey Supreme Court's decision in this case.

In *PruneYard* the Supreme Court held:

> It is, of course, well-established that a State in the exercise of its police power may adopt reasonable restrictions on private property *so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision* (emphasis added). 447 U.S. at 81.

The Court rejected the arguments of the shopping center owners in *PruneYard* that the California court's interpretation of the state constitution resulted in a prohibited taking or infringed any other federally guaranteed constitutional right of the owners. Specifically, the Supreme Court concluded there was no infringement of the shopping center owner's first amendment rights. 447 U.S. at 88.

The *PruneYard* case is easily distinguished from *Princeton University* v. *Schmid,* the case now before the Court. Unlike shopping centers which are business establishments with no expressive mission, universities and colleges have as their primary purpose the expressive activities of teaching and research.[2] These purposes are analogous to the functions of newspaper editors that the Court held worthy of protection from even benign state intrusion in *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), and their entitlement to first amendment protection distinguishes *Schmid* from *PruneYard* and requires a different result.

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[2] The function of a university is "to impart learning and to advance the boundaries of knowledge." *Goldberg* v. *The Regents of the University of California,* 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

In *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978), the Supreme Court recognized that the freedom of universities to conduct their "business" is "a special concern of the First Amendment." 438 U.S. at 312. Quoting from Justice Frankfurter's concurring opinion in *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957), the Court in *Bakke* affirmed that there are four "freedoms" essential to a university: "to determine for itself on academic grounds who may teach, what may be taught, how it should be taught, and who may be admitted to study." 438 U.S. at 312. Encompassed within these four freedoms is the right to control free from government intrusion access to the forum which a university and its campus represents.

In *Miami* v. *Tornillo, supra, citing CBS, Inc.* v. *Democratic Nat'l C'ee*, 412 U.S. 94, 117 (1973), the Court recognized only two controls on the power of the privately owned press to determine and advance its political, social and economic views—the sufficiency of its readers, and the journalistic interests of its editors. Recognizing that neither of these controls might be sufficient to guarantee that the private press would be "responsible" in its selection of news items and fair in its presentation of varying points of view, the Court nonetheless invalidated a Florida statute that sought to guarantee a range of parties access to the media for the purpose of insuring free and fair elections by ensuring an informed electorate.

> A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated. 418 U.S. at 256.

Similarly, the number of students wishing to attend an institution and the number of other parties wishing to contribute to its financial well being together with the educational interests of its faculty, students and administration are the only controls that should operate to circumscribe the four essential freedoms of a private university.

Justice Frankfurter, concurring in *Sweezy* v. *New Hampshire*, 354 U.S. 234, 261-62 (1975), described best the attitude the courts should have in approaching questions about the governmental intrusion in the intellectual life of universities:

> Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealings, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. *Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling* (emphasis added).

To determine in this case whether there exist compelling interests sufficient to justify the state's intru-

sion on Princeton's academic freedom, it is helpful first to understand what is *not* at issue here. This case does not present a conflict among members of "the community of scholars" or a situation in which either teachers or students are circumscribed by the administration in their exercise of academic freedom. This case presents the question *who* should decide what rule the "community of scholars" should observe regarding access by persons who are not members of the University community to the scholars' "marketplace of ideas."

In this case the record shows that the solicitation rule challenged by Mr. Schmid and held unconstitutional under the New Jersey Constitution was adopted not by the University administration acting unilaterally but by the Council of the Princeton University Community—a body composed of students, faculty, staff, alumni and administrators. Appellants' Jurisdictional Statement at 2a. The record further shows that the challenged rule governing access was amended by the same representative body in 1979 after Mr. Schmid's trespass arrest and conviction. Appellants' Jurisdictional Statement at 2a. Thus, it is the entire University community's policy decision that is adversely affected here not the errant whim of an administrator or the contested edict of a governing board.

The process by which Princeton's solicitation rule evolved and was amended is precisely the sort of educational experience one would hope this country's universities are providing their students. As Chief Justice Burger said in his concurring opinion in *Healy* v. *James*, 408 U.S. 169 (1972) (Burger, C.J. concurring),

> (P)art of the educational experience of every college student should be an experience in re-

> sponsible self-government and this must be a joint enterprise of students and faculty. *It should not be imposed unilaterally from above* . . . (emphasis added).

The courts should be the "last resort" in matters this central to the educational process. *Id.* When as in this case the policy judgment being reviewed represents a concensus reached through a lively and wide ranging internal debate, the courts should not choose lightly to substitute judicial edict for this exemplary educational experience.

The New Jersey Supreme Court cited the special nature and needs of the educational enterprise in its decision below:

> Private educational institutions perform an essential social function and have a fundamental responsibility to assure the academic and general well-being of their communities of students, teachers and related personnel. At a minimum, these needs, implicating academic freedom and development, justify an educational institution in controlling those who seek to enter its domain. The singular need to achieve essential educational goals and regulate activities that impact upon these efforts has been acknowledged even with respect to public educational institutions. *See, e.g., Healy* v. *James, supra,* 408 U.S. at 180, 92 S.Ct. at 2345, 33 L. Ed. 2d at 279; *Tinker* v. *Des Moines Indep. Community School Dist.,* 393 U.S. 503, 513-514, 89 S.Ct. 733, 740-741, 21 L. Ed. 2d 731, 741-742 (1969). Appellants' Jurisdictional Statement at 31a.

Yet, the court failed to recognize that the educational policy judgment made by the Council of the Princeton University Community is accorded protection from

state intrusion by the first amendment, and it did not develop "obviously compelling" reasons for the intrusion on the first amendment interests of the "community of scholars" resulting from the court's decision to compel specific "educational" uses of Princeton's property.

Rather than subject to strict scrutiny *its governmental action* limiting Princeton's freedom under the first amendment to decide how its property will be used to support its educational objectives, the New Jersey Supreme Court subjected Princeton's action—the action of a private "person"—to a content conscious, subjective test of reasonableness. The court tested Princeton's access rule against *the court's* understanding of Princeton's educational mission and concluded "a public presence within Princeton University is entirely consonant with the University's expressed educational mission." *State* v. *Schmid,* Appellants' Jurisdictional Statement at 29A. It is precisely this judgement which the federal constitution reserves to private universities such as Princeton. And, it is because the action of the New Jersey Supreme Court substitutes the state's judgment for Princeton's on this issue that the decision below must be reversed.

III.

The Independence Of Private Colleges From Unwarranted And Unconstitutional Governmental Intrusion Is Essential To Maintaining The Vitality Of America's System Of Post-Secondary Education And Its Contribution To The System Of Freedom Of Expression That The First Amendment Protects.

As one reads the New Jersey Supreme Court's opinion in this case, one cannot help but note the court's obvious underlying conviction that in *its* view the solic-

itation rule enforced by Princeton was in conflict with the court's notion of the proper way to administer a "market place of ideas." It may be that Princeton's rule was illogical or unwise but that is not the province of the court to decide absent compelling constitutional reasons. Indeed, it is the right to be distinctive that is the essential characteristic of an independent college or university which is protected by the first amendment. Contrary to the New Jersey Supreme Court's view that it was enhancing opportunities for open discussion by requiring Princeton to dedicate the use of its private campus to the expressive activities of strangers, the court's action was a push toward conformity among public and private colleges that strikes at the heart of "the system of freedom of expression" [3] protected by the first amendment.

As Judge Friendly noted, the value of the freedom guaranteed to private colleges "is the very possibility of doing something different than government can do, of creating an institution free to make choices government cannot—even seemingly abritrary ones—without having to provide a justification that will be examined in a court of law. . . ." [4] Without such a possibility for private institutions to act in ways different from the government, the "system of freedom of expression" protected by the first amendment would not exist. There would only be thoughts established by the gov-

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[3] *See generally* T. Emerson, The System of Freedom of Expression, Ch. I (1970).

[4] H. Friendly, The Dartmouth College Case and The Public-Private Penumbra quoted in Note, *Private Universities: The Right to be Different*, 11 Tulsa L. J. 58, 59 (1975).

ernment.[5] The first amendment protests against the establishment by the government of a particular ideology and insures the right of freely exercised dissent by private parties in much the same way as it protects against the establishment of religion and guarantees its free exercise.[6]

Together with tenure, diversity among America's educational institutions is an essential guarantor of the ideological diversity which the first amendment was written to protect and which is the foundation of our democratic government.[7] Diversity among colleges and universities does more than enlarge the range of educational products from which student consumers may choose. Evidence indicates that differences in the educational environments presented by different kinds of institutions (*e.g.*, highly selective and comprehensive universities, strongly denominational liberal arts colleges and colleges emphasizing engineering and science) result in differences in the progress and performance of their students and alumni. *See* C. R. PACE, THE DEMISE OF DIVERSITY? A COMPARATIVE PROFILE OF EIGHT TYPES OF INSTITUTIONS (1974) (hereinafter PACE). Enrollment changes since 1950 have tended to favor the large state universities and, consequently, the contribution and national impact of the distinctiveness of general liberal arts colleges has been reduced. PACE at 130.

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[5] Gottlieb, *Government Allocation of First Amendment Resources*, 41 U. PITT. L. REV. 205, 249 (1980) (the first amendment prohibits government establishment of thoughts).

[6] *See generally*, Stewart, *Or of the Press*, 26 HASTINGS L. J. 631 (1975).

[7] *See generally* Gottlieb, *supra* note 5 at 231-32.

These trends have led the authors of a technical report sponsored by the Carnegie Commission on Higher Education to observe

> we think it should be of some concern to those who shape public policy to note that the most distinctive institutions (for the most part private selective institutions) which means to some extent the institutions that are most effective in achieving their purposes, are also the ones that enroll the fewest students, are in the most serious financial condition today, and whose long range future is least assured . . . Further drift toward a least common denominator—whether in public tax policies, *educational conformity*, or private philanthropy—may further reduce the pockets of excellence and distinction in higher education that still remain (emphasis added). PACE at 131.

The New Jersey Supreme Court's opinion in this case acknowledges at several points the historical and judicial distinctions between private and public colleges. *See, e.g., State of New Jersey* v. *Schmid*, 84 N. J. 535, 423 A.2d 615 (1980), Appellants' Jurisdictional Statement at 9a and 31a. However, the net effect of the court's decision is to diminish these important distinctions resulting in further erosion of the pluralism and diversity of educational opportunities which are the hallmark of American higher education. This is exactly the sort of push toward educational conformity the Carnegie Commission report decries.

Judicial supervision and direction of private university decision-making regarding expressive activities on campus can only "undermine the integrity of private educational institutions, and, with it, the ability of these schools both to experiment and innovate in educational matters, and to satisfy a wide variety of

individual wants." Note, *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1055 (1968). "The interests of autonomy in private education call for judicial abstention (in this case)." *Id.*

The comments of Chief Justice Holmes for the majority in *Otis* v. *Parker*, 187 U.S. 606, 608-9 (1903), are apposite here:

> While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus.*

The role of the independent college as nurturer and/or protector of the various distinctive strands of our nation's culture has been overlooked and damaged by the New Jersey Supreme Court's opinion. To foster the intellectual, moral and sometimes the religious development of its students lies at the heart of the academic mission of many of these colleges. In this respect a private college is more akin to a church than a shopping center. Its property rights are given meaning and substance by its ability to create an atmosphere conducive to its definition of a productive voluntary association. The greatest threat to free speech does not come from allowing each of these private

colleges to determine the content of its educational message and to dedicate the use of its private property exclusively to its own efforts to communicate that message.[8] The greatest threat to free speech comes from permitting the government to regulate these private expressive activities even when the purpose is the laudable one of ensuring all voices are heard in a particular private forum.

> These pages need not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means exclusion of governmental intervention in the intellectual life of a university. *Sweezy* v. *New Hampshire*, 354 U.S. at 262 (Frankfurter, J., concurring).

Over a century ago, Benjamin Disraeli argued in the House of Commons against a proposal to establish a central system of government administration for Oxford University. He stated, "If I were asked, 'would you have Oxford with its self government, freedom, and independence, but yet with its anomalies and imperfections, or would you have the university free of those anomalies and imperfections and under the control of government?' I would say 'give me Oxford, free and independent, with all of its anomalies and imperfections.' "[9] Similarly, *amici* prefer a system of

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[8] Yudof, *When Governments Speak: Toward A Theory of Government Expression And The First Amendment*, 57 TEXAS L. REV. 863, 873 (1979).

[9] Quoted in Student Rights in Private Universities: The Impact of Federal Aid to Higher Education, Address by Jose Cabranes, then General Counsel of Yale University, Federal Bar Association Second Annual Conference on Student Rights, Arlington, Virginia (March 22, 1976).

higher education in America that includes private universities free to make mistakes as well as to excell over one in which all institutions, for better or for worse, conform to a single government ideology.

CONCLUSION

For each of the reasons set forth above, the Court should reverse the decision of the court below.

Respectfully submitted,

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